IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 869 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
CHHATRASINGH M PARMAR & 1 - Opponent(s)

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Appearance :
Mr.K.C.Shah, APP for Appellant(s) : 1,
MS RV ACHARYA for Opponent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 13/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. Heard Mr.K.C.Shah, learned APP for the State and Ms.Acharya, learned advocate for the other side.

2. The present appeal is against the order of acquittal passed by the learned Additional Sessions Judge, Vadodara in Sessions Case No.63 of 1985, whereby the learned trial Judge has acquitted both the respondents (original accused) observing that the prosecution has not proved the charge levelled against the accused of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The learned trial Judge, after detailed discussion, acquitted the accused giving them benefit of doubt.

3. The order of acquittal has been assailed by the State mainly on the grounds mentioned in para 6 of the memo of appeal.

4. Learned APP Mr.Shah has taken us through the oral as well as documentary evidence led during the course of trial and also through the judgment under challenge. To appreciate the say of learned APP, first we would like to state the facts of the case of prosecution in brief. In para 2 of the memo of appeal, the appellant – State has narrated the facts in short. For the sake of brevity and convenience, we would like to reproduce the relevant para 2 of the memo of the appeal which is able to take care of the story of the prosecution that was placed before the trial court. The allegations against the accused are

that the accused no.1 is the son of accused no.2. Both of them resided in Baroda. Accused no.1 was married with bai Sita sister of deceased Fatesinh about 5 to 6 years prior to the incident. As the accused no.1 and bai Sita did not use to pull on together, bai Sita left the house of accused no.1 and she used to reside with Prabatsinh Motisinh father of the deceased since last two to three years in village Gametha. The deceased Fatesinh also reside at that village but little away from the house of his father. Bai Sita filed maintenance application against the accused no.1 in Padra Court and its hearing was fixed on 27.7.85. It is further the prosecution case that on 29.5.86, the deceased Fatesinh and his wife Manjula were sleeping in the field of the father and their younger daughter Laxmi was sleeping with the deceased parents in front of the house. At about 2.00 O'clock at night, there was some noise coming from the direction that deceased Fatesinh was sleeping so his wife Manjula woke up and she saw that the accused no.1 was sitting over the chest of the deceased and was pressing throat while accused no.2 had also seated on the legs of the deceased and accused had threatened bai Manjula not to shout otherwise he would kill her. Both the accused took away the deceased to the cattle shed nearby and there they beat the deceased to death. After the accused went away bai Majula got up from the cot and informed her father-in-law Prabatsinh in the village and thereafter when Prabatsinh came at the scene of incident he found that his son had died due to

strangulation. He informed the Sarpanch and thereafter he lodged a complaint at Padra police station.

5. We have carefully gone through the judgment under challenge in the background of the version of four important witnesses viz.Manjula wife of the deceased, Fatesinh, Prabatsinh father of deceased Fatesinh, Investigating Officer – Police Sub-Inspector R.N.Gohil and the panch who has proved the scene of offence of occurrence. We have considered the opinion expressed by FSL expert and the Doctor who had performed the autopsy – postmortem of the deceased Fatesinh in the background of the post-mortem tendered in evidence by the Dr.Bharatkumar Pandya - Exh.9.

6. There was no doubt before the trial court that death of the deceased Fatesinh was a homicidal death and the cause of death was suffocation due to strangulation.

7. The prosecution has satisfactorily established that the accused persons had enemical feelings with the deceased. Of course, there is no cogent evidence to show that the deceased was actively supporting his sister Savita, wife of accused No.1 Suresh. But, it is clear that real sister of the deceased Fatesinh had married accused No.1 an she was at her parental home. There was a litigation pending in the court of Judicial

Magistrate, First Class, Padra, whereby Savita – wife of accused No.1 and sister of Fatesinh had prosecuted accused No.1 for maintaining for herself and the minor daughter who has been referred as “Tenki” at one place in evidence. Earlier, an attempt to assault was made by the accused persons of deceased Fatesinh and for that a formal complaint was also filed and, according to learned APP on the grievance expressed by Fatesinh, a chapter case was registered against the accused persons. It is also in evidence that on 27.5.1985 i.e. 3 days prior to the incident, the case was kept for settlement and the accused persons were asked to bring sureties – persons who can assure the peaceful and safe life for Savitaben. The matter was adjourned for the purpose on 4th June. In chapter case, the next adjournment was 2nd June. It is alleged that after midnight on 29.5.1985 i.e., at early hours on 30.5.1985, both the accused had gone to the residence of deceased Fatesinh surreptitiously after about 2 a.m., and he was done to death by strangulation. To strangulate the deceased, the bed cover was used popularly known as `chadar'. Sometimes, a thin bed cover is being used to cover the body after sleeping during hot days. According to prosecution, the deceased was in bed in the open land in his field. His wife was also sleeping. Both of them, when they were in sleep were assaulted. Manjula w/o of the deceased was threatened and some cotton was also placed in her mouth, so that she cannot shout for help. When she saw that her husband is being beaten and his mouth has been obstructed by

pushing one part of the bed-cover `chadar', she rushed to her father-in-law and mother-in-law who were residing at a distance of about 1000 yards. Father-in-law of Manjula, thereafter, had accompanied her to the field and they found Fatesinh lying dead in a cotton roof shed enacted for the purpose to keep their live stock. The learned trial Judge, therefore, was required to appreciate the evidence mainly of P.W.Manjula and for that reason, it is observed that it is not safe to place reliance on the version of Manjula. The learned Judge has found that the enemical term between the parties proved by prosecution is not sufficient to link the accused with the crime, as the evidence of eye witness Manjula is not reliable piece of evidence for not accepting the version of Manjula. The learned trial Judge has observed that (i) there is one material improvement in the version of Manjula before the court that her mouth was also obstructed with a piece of cloth and, therefore, she could not shout because in her initial version, this fact was not stated by her to police, (ii) a wife with a small kid normally would try to save the life of the deceased instead of running to other direction, (iii) it was possible for her to shout for help and it is in evidence that by listening shouts, it was possible for the neighbours who are having their houses in the adjacent agricultural field to rush at the place of incident, (iv) she has not stated in her evidence that she was sharing bed with her husband. The impression created in the mind of Court is that she and her little kid

should be in the separate cot and the deceased must be sleeping in his cot independently. In the scene of offence panchanama, there is description of only one cot and there is no reference of any other cot lying nearby to the cot of the deceased.

8. The delay in FIR is also a fatal fact situation in the present case and there is material contradiction as to the time of reaching to the Police Station by Manjula and Prabhatsinh. Even panch witness says that he was called as panch at the scene of occurrence at about 8 a.m. The time of lodging of complaint is mentioned specifically by the complainant Prabhatsinh and according to him, the FIR was given at about 5 a.m. On verification, the trial Judge is found that the complaint has been lodged at about 9.45 a.m., and panchanama of scene of occurrence is of 10.50 a.m.

9. The distance between the place of incident and the Police Station is of about 5 kms., and is known as Masar road. So, the complainant could have reached to the Police Station much earlier than 9.50 a.m. The learned Judge, therefore, has observed that this is a case where probably P.W.Manjula who is claiming to be eye witness has not seen the incident. She being young female aged about 23 must be sleeping in inside the house and on realising that her husband is done to death in the early hours of the day, she must have rushed to her father-in-law and, therefore, only complaint has been filed at about 9.50 a.m.

10. It is also observed by the learned Judge that when Manjula met P.W.Prabhatsinh - the complainant, she had informed Prabhatsinh that your son has been killed. So, it would not be safe for the Court to accept the say of Manjula that she had left the place of incident when the accused persons were actually beating her husband and trying to obstruct his mouth.

11. It was night hours and the incident has occurred during night hours. The place where the incident occurred has no electricity facility and there was no electricity light and by use of kerosene lamp, referred by the witness as “khadiya”, the dead body of the deceased was found and his death was asserted. According to the learned Judge, it was not possible for a witness to identify the presence who must have made assault first on deceased Fatesinh. Of course, it was 11th day of bright moon and there may be a sufficient light in the sky, but when the presence of Manjula just adjacent to cot of her husband is found doubtful, then her claim that she has seen the incident whether should be accepted as trustworthy piece of evidence or not was the question. The learned trial Judge had liberty to notice demeanour of the witness etc., and it has decided to acquit the accused saying that the evidence of the sole witness Manjula does not inspire confidence, then while dealing with the appeal against the order of acquittal, this Court should not

interfere with such finding.

12. According to us, the findings recorded by learned trial Court is based on some good legal reasons and when it is not possible for this Court to observe that appreciation of evidence and inference drawn by the learned trial Court of acquittal is palpably wrong and it is perverse, the order of acquittal should not be reversed. It is also settled that mere some view is possible, the Court dealing with the acquittal appeal should not try to rewrite the judgment by placing that alternative other view. According to us, the evidence of Prabhatsinh and Manjula has been rightly appreciated. The delay in FIR as well as drawing of panchanama at a belated stage at about 11.15 also affects adversely to the genuineness of the story unfolded by these 3 witnesses. The strong motive that may be there in the mind of the accused cannot take place of a cogent proof established when the structure of the case of prosecution is based on eye witness.

13. In short, we do not find any merit in the appeal. The appeal is, therefore, dismissed.

(C.K.BUCH, J)

(SHARAD D DAVE, J)

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